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No. 06-370

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IN THE

Supreme Court of the United States

JESSIE DORADO, INDIVIDUALLY AND AS MOTHER and NEXT FRIEND OF BRIANA ALEXIS MIRANDA, A MINOR and ON BEHALF OF THE ESTATE OF EDUARDO MIRANDA A/K/A EDUARDO MIRANDA DUARTE, DECEASED,

Petitioners,

v.

THE COUNTY OF EL PASO, TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Texas, Eighth District, El Paso

REPLY BRIEF

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REPLY BRIEF

This Petition raises issues of constitutional and federal law. It is not an invitation, as the Brief in Opposition would have it, to resolve spurious, complex issues of fact. Four Justices of this Court agree that the law of 42 U.S.C. §1983 is not settled and deserves to be "reexamined'. *Board of the County Commssioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 430, 431 (1997). Petitioner has elaborated on this in its Petition. It is not necessary to repeat those arguments here. Nor is it necessary to respond to the tangle of so-called factual issues that Respondent has dumped into its Brief in Opposition other than to refute below, point by point, Respondent's "Correction to Facts Presented by Petitioners." Petitioner will address only a few additional points in the Brief in Opposition.

DOUBLE STANDARD OF REVIEW

The Texas Court of Appeals subjected decedent's jury verdict, that granted relief for denial of his constitutional right to adequate medical care while incarcerated, to a standard of review not imposed on other kinds of claims. This Court has held that burdening the exercise of a federal right in state court with state law procedural obstacles is impermissible. Respondent defends the disparity by distinguishing cases in an irrelevant manner. The variety of instances in different areas of the law which have disapproved a double standard attests to the breadth of the proposition: *Dice v. Akron, Canton & Youngstown R.R.*, 342 U. S. 359 (1952) holds that the state may not apply a state procedure to deny jury trial to a claimant under federal law which grants jury trial; *Felder v. Casey*, 487 U. S. 131 (1988) holds that relief under §1983 may not be conditioned on first using a state-created notice of claim provision; *Howlett v. Rose*, 496 U.S. 356 (1990) holds that state law of sovereign immunity may not be interposed to deny relief in a §1983 case; *Republic Pictures v. Kappler*, 327 U. S. 757 (1946) prohibits using a shorter statute of limitations for a right under federal law than that prescribed for state law

claims. The general proposition of those cases, applied to Petitioners' claims, strongly suggests the principle that the Texas courts may not impose a disadvantageous procedural burden on Petitioners by reviewing the jury verdict de novo, and granting judgment notwithstanding the verdict, when in cases involving state law rights it upholds jury verdicts that are supported by any evidence.

POLICY MAKER

Respondent cannot deny that Dr. Block was a policy maker for health care matters at the jail. His contract with the County reiterates several times that he was. Indeed, it provides that the Medical Director (Dr. Block) may make medical decisions that override custodial decisions. He was a powerful policy maker.

The Respondent argues, as did the Court of Appeals, that the sheriff was the "final policy maker." Petitioners address this more fully in their Petition, but here point out only that there may be more than one policy maker and that policy-making authority may be delegated. Dr. Block's contract with the County (Plaintiff's Exhibit 55) was approved by the sheriff, Leo Samaniego, which indicates that the sheriff (according to the Court of Appeals, the "final" policy maker) delegated policy making authority to Dr. Block or acknowledged him as a policy maker.

There was no way to appeal denial of Dr. Miranda's medication to a hypothetical "final" policy maker. Respondent points to a supervisory procedure, but it applied only to record-keeping. (vol 16 – 58-60). If some procedure had existed, Dr. Miranda was helpless to employ it. His wife appeared at the jail with medication for him and was turned away. To whom should she have appealed? How would she know who that might be? How could she appeal? The ridiculousness of these questions shows how meaningless was

the status of "final" policy maker in the context of this case. It might make sense in a case in which an employee appeals an adverse job decision. There is time to appeal; a superior officer or body could award meaningful relief. But the concept is meaningless for a jail prisoner adversely affected by withholding medication or, worse, convulsing on the floor of his cell.

DELIBERATE INDIFFERENCE

The Texas Court of Appeals dismissed a claim of "deliberate indifference" by deciding that Dr. Block had failed only with respect to the "nature and timing" of treatment, not by "failure" to provide any medical care at all. They make the outrageous assertion that "[t]here was no proof that any of the medical personnel knew about decedent's real condition." Brief in Opposition 14. It would be tedious here to repeat all the places in the record describing the falsity of that assertion. See Appendix to this Reply Brief and responses to Respondent's so-called "Corrections to Facts Presented by Petitioners."

SO-CALLED "CORRECTIONS TO FACTS PRESENTED BY PETITIONERS"

Respondent's Brief in Opposition opens with "Corrections to Facts Presented by Petitioners." These "corrections" must be read in light of the jury verdict which supports Petitioners', not Respondent's assessment of the facts. Respondent simply is asking this Court to come to a conclusion contrary to the jury's.

The "Corrections" are false, misleading or irrelevant, as follows:

1. Respondent asserts: "decedent did receive his medication, as prescribed by Dr. Block. On the evening of March 1 he received 2 milligrams of Ativan. (vol 12 p 92; vol.

13 p 62). On the evening of March 2, an attempt was made to give him his medicine but he did not respond to his name being called out twice."

Entirely misleading: Petitioner's daily medication was 5 to 6 milligrams of Ativan during the day, 2 milligrams in the evening. (vol 12 - 84-85). Petitioner was arrested Thursday, February 27, 1997. He requested medication all day Friday, February 28, but received nothing that date. (vol 10-139). He requested medication all day Saturday, March 1, but received nothing during that day. (vol 12-86). That evening he received 2 milligrams of Ativan (vol 13-61-62). Sunday morning, March 2, he called his wife and reported "feeling bad" (vol 12 – 92) still not having received any medication. That day he received no medication. (34 Ex. P34; *Dorado*, 180 SW 3d at 867). Sunday evening, when medicines were being distributed, a nurse called deceased's name twice, but for reasons that are unknown he did not respond. (180 SW3d 867). He was later found convulsing on the floor of his cell (vol 9-76, 14-21 et seq.) Quite likely he was already convulsing or in a pre-convulsive state when his name was called.

2. Respondent asserts: "Furthermore, Ativan was not Dr. Miranda's seizure medicine." "Ms. Dorado's testimony was that her husband had been self-prescribing the medicine for six years to treat sleeplessness problems.... that he was taking five to eight pills per night (10 to 16 milligrams) and one or two during the day.... He may have taken more during the day of which she was not aware."

The facts are: Mrs. Dorado described seizures that her husband had had and that he took Ativan to prevent them. (vol 12-77 to 85). The number of milligrams is Respondent's estimate. Mrs. Dorado did not testify as to strength of each pill. Nurse Carlos Dominguez testified (vol 13-52) "Q. Would you tell the ladies and gentlemen of the jury what Doctor Miranda told you? A. That he had a history of seizure disorder

and it was treated in Mexico. And the medication to maintain him seizure-free was Ativan."

Mrs. Miranda also testified: "They asked me if he had been taking medication, and I told them that, yes, for seizures. I think I told him -- I think it was Detective Reuter who I told that he was taking medication, that he was taking Ativan for seizures." (vol 12-93) ; Nurse Dominguez testified: he needed to have his medication for a seizure disorder.." "... he had a history of seizure disorder and it was treated in Mexico." (vol 13- 52). Nurse Dominguez, testifying from contemporaneous notes: "I told him when was the last seizure he had. He had it three months and, then six months (ago)." (vol 13- 59). And, "this neurosurgeon, Dr. Martin Rodriguez, placed me on Ativan, 2mg QHS...." (vol 13 60-61). "Two milligrams at night just to maintain him seizure free." (vol 13 – 61)

"Q. But, he made clear to you that, if he didn't get his medication he could get hurt. He'd have a seizure. A. Yes, sir." (vol 13 - 61).

Dr. Block also testified that he knew that Ativan was necessary to control Dr. Miranda's seizures (10-46).

In any case, the County knew that withdrawal of Ativan would quickly bring on seizures.

Dr. Block failed to visit Dr. Miranda Sunday morning (10 – 152 – 153). Dr. Block knew that Dr. Miranda was in danger of physical injuries or death due to convulsions (10-152-153).

3. Respondent asserts: "Petitioners state, 'The jury found that his [Dr. Block] deliberate indifference caused decedent's death.' The jury did not find that Dr. Block's deliberate indifference caused Dr. Miranda's death. The jury instructions (objected to by Respondent) let the jury decide against the County if the deliberate indifference of 'any employee or official of El Paso County' deprived Dr. Miranda of his

constitutional rights."

In fact, the jury was instructed also that "the County of El Paso ... may only be found liable if you additionally find that the deprivation of his constitutional right to adequate medical care was caused by a custom, policy or practice adopted by the County of El Paso with deliberate indifference to Doctor Miranda's constitutional rights.

"A policy may be either one, a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by an official to whom the lawmakers have delegated policy-making authority...." (vol 17 – 54-55).

The jury had before it Dr. Block's contract that in multiple places granted him policy-making authority concerning health care and medication. Dr. Block was the only employee with policy-making authority whose decisions concerning Dr. Miranda were before the jury. The Court of Appeals decision is based on lengthy discussion of and its judgment about Dr. Block's role in this case.

4. Respondent asserts that "Petitioners correctly state that one of their allegations was that the County caused decedent's death by failing to give him medicine, but they mislead by omission by failing to include their other allegations that the death was caused by the jailers' killing him by positional asphyxiation when they were transporting him from his cell to the clinic or that the nursing staff was negligent for the improper use of the syringe to apply medication."

This is merely argumentative. *In fact*, the failure to give medicine and the other alleged causes of death, as well as the cause cited in the autopsy report (vol 14 -27) (Dr. Miranda died from pulmonary arrest as a consequence of a seizure) are all interrelated. Positional asphyxiation, improper syringe use and pulmonary arrest would not have occurred without failure to give petitioner his seizure medication.

5. Respondent asserts: "There is no evidence that jailer Arvizu didn't speak Spanish other than LVN Dominguez who had never heard him speak Spanish, and the evidence suggests that he did speak Spanish. (Ct. R. vol. 16 at 78).

In fact, witness Captain Hernandez, cited by Respondents, recanted.: On direct he testified, "Q. And he does speak Spanish? A. He does, yes, sir, Pablo Arvizu." (vol 16 – 78). But, to the contrary, on cross examination he testified: "Q. Do you personally know whether he knows Spanish or not? A. You know, I supervise too many people. To say I heard him in a conversation in Spanish, no I would not." (vol 16 – 103)

6. Respondent asserts: "Petitioners state, 'Captain Hernandez... testified that when a medical condition appeared at intake someone from the medical department would be called to complete the interview." "Someone would be called ... only if a serious medical condition was indicated." Captain Hernandez did not testify that someone from the medical department would be called down to complete the interview whenever any medical condition is revealed during intake. He testified that if an inmate during the classification interview indicated an immediate need to take medicine or an immediate medical problem, the interviewing officer would notify the clinic.'"

This is merely argumentative, describing a disagreement as to what constitutes a serious medical problem.

7. Respondent asserts: " 'Dr. Miranda's widow testified that it had been prescribed .. by a Dr. Martin Rodriguez in Juarez in 1991.' " Their citation to the record is to a different witness than Ms. Dorado. Instead, Ms. Dorado specifically testified that Dr. Miranda self-prescribed the medicine."

The evidence is "this physician, Doctor Martin Rodriguez, had put him on Ativan two milligrams at night." (vol 13- 61). The witness did not testify as to daytime administration of

Ativan. Other testimony is confused (e.g., vol 12–154) as to whether counsel and witnesses were talking about Dr. Martin Rodriguez or a Dr. Navarette or the deceased. The deceased had renewed the Rodriguez prescription between the time it was written and his death. A Dr. Navarette (15-176) counseled deceased that he should slowly get off Ativan.

The provenance of deceased's medication (that is, whether from a prescription by Dr. Rodriguez, Dr. Navarette, or deceased himself) is irrelevant to whether, knowing that deceased suffered from convulsions and required medication for them, defendants treated him with deliberate indifference. There is nothing in the record suggesting that a physician's renewing a prescription for himself is illegal, improper or unusual in any way.

8. Respondent writes that Petitioner's assertion that on "the last day of Dr. Miranda's life, the jail authorities 'unequivocally knew everything about Dr. Miranda that would have enabled them to save his life....' is incorrect."

Indeed, they did know everything about Dr. Miranda that would have enabled them to save his life. It is the fact that on Sunday Dr. Block knew of Dr. Miranda's susceptibility to convulsions, his need for Ativan, that except for two milligrams he had not had any for the past 48 hours, his need to be seen by a physician. Dr. Block vowed to see Dr. Miranda Sunday morning, but didn't. Nothing further at this point had to be known in order for a physician to examine Dr. Miranda and administer his needed medication.

9. Here Respondent returns to its main theme that Dr. Miranda is somehow to blame for the Respondent's conduct, hoping to create a species of "contributory negligence" defense. Beginning with the booking process, Respondent contends that: "Dr. Miranda was not truthful to the intake

officer with regard to his medical condition (Ct. R. 24 at P-12)." (Resp. Brf. at 3).

This statement is based exclusively on a form filled out by an officer, Arvizu, who did not testify at trial. The jury did know that officer Arvizu himself did not correctly fill out the same form. He failed to note that one of Dr. Miranda's possessions at the time of booking, which he was supposed to log in, was Dr. Miranda's Ativan medication:

Petitioners attach an Appendix to this Reply which they hope puts an end to this red herring. It demonstrates that jail authorities knew everything they had to know to treat Dr. Miranda appropriately, and not ignore the grave danger his life was in.

This Appendix should be read in the context of Respondent"s repeated efforts to traduce Dr. Miranda's character as a liar and otherwise a bad man to justify failure to provide his medication. They proffered testimony of Jesus Morales, a jail employee, who first met Dr. Miranda while he was in the jail. Morales would have told the jury that a blonde hair was found in Dr, Miranda's automobile, that he had been on a three-day drinking binge (over a period of only one day!) and that he had been unfaithful to his wife. The court excluded this testimony (vol 15-124, 203). The argument of paragraph 9 in the Brief in Opposition that deceased was not truthful is of a piece with the defense, which consists of an attack on the character of the deceased.

10. Respondent asserts that "Petitioners omit several pertinent portions of Dr. Block's contract." The pertinent parts of Dr. Block's contract (Plaintiff's Exhibit 55) gave him power to make policies for health care and medication at the jail, including power to override custodial considerations.

"It is further agreed that: A. No regulation of the FACILITY shall involve the MEDICAL DIRECTOR in any

aspect of the correctional or disciplinary procedures which is not related to genuine medical concerns, or which would unduly restrict or compromise the medical judgement of the MEDICAL DIRECTOR."

"B. In situations requiring emergency medical care, custody procedure shall yield to the medical needs of the inmates as determined by the MEDICAL DIRECTOR...."

Notably, with regard to the sheriff's role, Lee Samaniego, Sheriff of El Paso County, signed the contract under "Approve as to Content."

11. Respondent asserts that "Petitioners claim that there was no oversight or review of the medical staff. Again this is incorrect. Captain Hernandez dealt with complaints from inmates concerning their medical care," etc.

In fact Captain Hernandez was not working at the jail at the time Dr. Miranda died. (vol 16 – 85-86).

The record (vol 16-58-60) which Respondent cites in support of the claim about oversight and review merely deals with failure to keep proper records. Personnel who did not keep proper records could be disciplined. Moreover, nowhere does Respondent suggest how someone in Dr. Miranda's situation could exercise such a right of review if it existed.

12. Respondent asserts "Petitioners state that decedent 'was in extremis on Sunday morning.' This is incorrect."

Once more this is argumentative or, rather, quibbling. "In extremis" means "facing death," or "at the point of death." Indeed, Dr. Miranda was on Sunday morning only hours away from his fate and feeling it.

Respectfully submitted,

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APPENDIX

APPENDIX OF EXTRACTS FROM RECORD

Q: In screening, the notes of Arvizu says that he didn't have any medication on him; but you personally confirmed that the man had medication on him. Why is that? How can the screening person miss that?

A: (Nurse Dominguez) Because there were not trained to–they could have think (sic) that they was just candy or just a regular wrapper, and they didn't pay attention." (vol 13-69)

Could Arvizu communicate with Dr. Miranda, who spoke only Spanish? The testimony about Officer Arvizu included:

Q: Were there jailers who didn't speak Spanish?

A: Yes Sir.

Q: Arvizu–did you know him?

A: Just from the jail system.

Q: Does Arvizu speak Spanish?

A: To the best of my knowledge, I don't recall him speaking Spanish; but, I may be wrong."(13-68).

See also testimony of Captain Hernandez to the same effect (vol 16-103).

Q: All, right. And did you talk to him anymore on Friday?

A: (Mrs. Dorado) Yes, I did.

Q: All right. When did you talk to him?

A: It was in the evening.

Q: How did that come about?

A: He told me he was feeling ill, and he had asked for his medication. And they were -- they didn't listen to him." (vol 12-84)

...

Q: All right. Now, Saturday morning, March 1st, what happened?

A: I went to pick up the vehicle early in the morning, because it was impounded. And, then, I had talked to him about noon, and he asked me to go see him, that he wasn't feeling well, that he had woken up – he was worse. He felt he was worse. And he said he had been asking for his medication and they weren't listening to him. And he wanted me to try to see if I could help him.

....

So, I went downstairs to the front desk and I explained to them that my husband needed his medication, that it was in his wallet. (vol 12-86)

....

Q: Would you tell the ladies and gentlemen of the jury what Doctor Miranda told you?

A: (Nurse Dominguez) That he had a history of seizure disorder and it was treated in Mexico. And the medication to maintain him seizure-free was Ativan. And he had it in his possession in the booking holding, and that he needed this medication; if not, he was going have a seizure. (vol 13- 52 to 53)

....

Q: Having gone to medical school in Juarez, having some background there, was Ativan, from your

personal experience, medication used to control seizures?

...

A: Ativan is highly prescribed in Mexico as a benzodiazepine, which is a medication that will maintain the triggering electrical from the brain to decrease the sensation and decrease the occurrence of a seizure disorder. (vol 13-53)

Q: Okay. Did you ask him how much he was using?

A: Yes, I did.

Q: Tell the ladies and gentlemen of the jury what he told you?

A: He told me he was taking high dosages, the number – I believe it was up to eight milligrams, or something like that – six to eight milligrams.

Q: And when he told that you, how did you react? (sic)

A: One, I mean – I was a little bit shocked at the beginning; but, the maximum dose for Ativan is up to ten milligrams. So, I asked him – because it was night, I asked what was the amount of medication he was taking at night; and, he told me he was taking two milligrams at night.

Q: Did you ask him what would happen if he didn't get his medication?

A: He will have a seizure immediately.

Q: Did he tell you how long he had a history of seizures?

A: It was a long time.

(vol 13-54).

....

Q: After you confirmed the medication, did you then have some concerns about what to do with it?

A: Yes, sir. That's why I called Doctor Harold Block.

...

Q: Did you let Doctor Block know that this man was a medical doctor in Juarez?

A: Yes, I did.

Q: Did you let Doctor Block know the extent of the medication that this man was using?

A: Yes, I did. (vol 13-56)

....

Q: Did you express your concerns to Doctor Block – that you really didn't know how to assess this man and that he needed Doctor Block to check him out?

A: Yes, I did.

Q: And did Doctor Block tell you whether he would be that night to see him or what he would do?

A: He just gave me orders to administer medication – two milligrams of Ativan – and that he would be there in the morning.

Q: Did you emphasize to Doctor Block that he needed to see him in the morning?

A: Yes, I did.

Q: And what did Doctor Block say when you emphasized that?

A: That he'll be there.

Q: That would have been a Sunday morning?

A: Yes, sir. (vol 13-57).

....

Q: Okay. And there's another note in here I'm going to address also. I'll come back to that. It says, "I developed convulsions six months ago and, then, three months ago."

Did the man – Doctor Miranda develop convulsions six months ago, and, then, three months ago: or, is that your explanation that the man had seizures three months ago and six months ago?

A: Yes, that's what he told me. I told him when was the last seizure that he had. He had it at three months and, then, at six months. (vol 13-59, 60).

....

Q: Did he tell you how long he had a history of seizures?

A: It was a long time. (vol 13-54).

....

Nurse Dominguez:

Q: Tell the ladies and gentlemen of the jury what he told you?

A: He told me he was taking high dosages, the number – I believe it was up to eight milligrams, or

something like that – six to eight milligrams. (vol 13-54)

Jessie Dorado:

Q: Can you please read the last two sentences of that answer where it begins with, "He was taking"?

A: "He was taking Ativan throughout the night; sometimes approximately five to eight pills per night; sometimes one or two pills during the day as needed." (vol 12-127)